

1 Mandi J. Karvis/Bar No. 021858
2 **WICKER SMITH O'HARA MCCOY & FORD, P.A.**
3 One N. Central Ave., Suite 860
4 Phoenix, AZ 85004
5 Telephone: (602) 648-2240
6 Fax: (602) 812-4986
7 E-mail: MKarvis@wickersmith.com

8 -and-

9 Henry R. Chalmers (*admitted pro hac vice*)
10 Edward P. Cadagin (*admitted pro hac vice*)
11 **ARNALL GOLDEN GREGORY LLP**
12 171 17th Street NW, Suite 2100
13 Atlanta, GA 30363
14 Telephone: (404) 873-8646
15 E-mail: henry.chalmers@agg.com
16 E-mail: edward.cadagin@agg.com

17 *Attorneys for Defendant First Advantage Corporation*

18 **IN THE UNITED STATES DISTRICT COURT**

19 **FOR THE DISTRICT OF ARIZONA**

20 Justin Downing, individually and on behalf
21 of all others similarly situated,

22 Plaintiff,

23 vs.

24 Lowe's Home Centers, LLC, a North
25 Carolina limited liability company; and First
26 Advantage Corporation, a Delaware
27 corporation,

28 Defendants.

Case No.: CV-22-08159-PCT-SPL

**DEFENDANT FIRST ADVANTAGE
CORPORATION'S ANSWER AND
DEFENSES**

Defendant First Advantage Corporation ("First Advantage" or "Defendant") submits this, its Answer and Defenses to the First Amended Class Action Complaint ("Amended

1 Complaint”) filed by Justin Downing (“Plaintiff”), respectfully showing the Court as
2 follows:

3 **ANSWER**

4 1. Enacted to promote the accuracy, fairness, and privacy of consumer
5 information contained in the files of consumer reporting agencies, the FCRA explicitly
6 protects consumer from disclosure of their personal information contained in their
7 consumer reports. To that end, employers who obtain and use consumer reports regarding
8 their job applicants and employees are required to provide, prior to obtaining consumer
9 reports in the first place, a clear and conspicuous disclosure, in a document consisting
10 solely of the disclosure (i.e., that stands alone), that a consumer report will be obtained for
11 employment purposes. And for their part, when preparing the reports, consumer reporting
agencies must implement and follow procedures designed to ensure maximum possible
accuracy of the information they provide concerning the individuals about whom the
reports relate and to ensure that the information is complete and up to date.

12 **RESPONSE:** First Advantage admits that the FCRA is a federal statute that is
13 designed to address a number of issues, including those involving consumers and
14 information contained in consumer reports. First Advantage admits that 15 U.S.C. §
15 1681b(b)(2)(A) states “Except as provided in subparagraph (B), a person may not procure
16 a consumer report, or cause a consumer report to be procured, for employment purposes
17 with respect to any consumer, unless – a clear and conspicuous disclosure has been made
18 in writing to the consumer at any time before the report is procured or caused to be
19 procured, in a document that consists solely of the disclosure, that a consumer report may
20 be obtained for employment purposes.” First Advantage admits that 15 U.S.C. § 1681e(b)
21 states “Whenever a consumer reporting agency prepares a consumer report it shall follow
22 reasonable procedures to assure maximum possible accuracy of the information concerning
23
24
25
26
27
28

1 the individual about whom the report relates.” First Advantage denies any and all
2 remaining allegations in paragraph 1 of the Amended Complaint.

3
4 2. Defendant Lowe’s willfully violated the FCRA by: (1) failing to provide a
5 standalone, upfront disclosure that Defendant may procure consumer reports about its
6 applicants and employees, and (2) failing to provide a clear and conspicuous disclosure
prior to obtaining consumer reports.

7 **RESPONSE:** First Advantage is without knowledge or information sufficient
8 to form a belief as to the truth of the allegations in paragraph 2 of the Amended Complaint.
9
10 Accordingly, those allegations are denied.

11 3. Lowe’s willfully violated the FCRA by failing to provide applicants or
12 employees with a standalone disclosure that clearly and conspicuously indicates—in a
13 document consisting solely of the disclosure—that Lowe’s may obtain a consumer report
14 about them for employment purposes. That is, Lowe’s provides a single disclosure that
15 includes extraneous information regarding Lowe’s supposed ability to obtain consumer
16 reports regarding the applicant’s children/wards. The disclosure also contains additional
extraneous information regarding future disclosures and authorizations that may be sought.

17 **RESPONSE:** First Advantage is without knowledge or information sufficient
18 to form a belief as to the truth of the allegations in paragraph 3 of the Amended Complaint.
19
20 Accordingly, those allegations are denied.

21 4. The inclusion of such extraneous information overshadows the consumer
22 report disclosure and renders the disclosure confusing to Plaintiff and to any reasonable
23 person. By including extraneous information, it is unclear as to whether Lowe’s intends to
24 procure a consumer report regarding the applicant, their children/wards, or both. This lack
25 of clarity frustrates the purpose of the FCRA, which is to inform consumers and allow them
26 a meaningful opportunity to authorize such disclosures. Plaintiff was confused by the
27 disclosure, and had a lawful disclosure been provided, Plaintiff would not have signed it.
28

1 **RESPONSE:** First Advantage is without knowledge or information sufficient
2 to form a belief as to the truth of the allegations in paragraph 4 of the Amended Complaint.
3
4 Accordingly, those allegations are denied.

5 5. For its part, Defendant First Advantage willfully violated the FCRA by
6 furnishing consumer reports while failing to implement and follow reasonable procedures
7 to ensure the maximum possible accuracy of the information contained in the report. That
8 is, First Advantage compiled consumer reports regarding Plaintiff and class members that
included inaccurate dispositions of past criminal histories.

9 **RESPONSE:** First Advantage denies the allegations in paragraph 5 of the
10 Amended Complaint.
11

12 6. First Advantage also willfully violated, and continues to violate, the FCRA
13 by failing to maintain (or follow) strict procedures designed to ensure that public record
14 information is complete and up to date when it is included in consumer reports and is likely
15 to have an adverse effect on a consumer's ability to obtain employment. Here, First
16 Advantage furnished consumer reports relating to Plaintiff and class members containing
outdated and incomplete dispositions of past criminal histories.

17 **RESPONSE:** First Advantage denies the allegations in paragraph 6 of the
18 Amended Complaint.
19

20 7. By failing to adopt (or follow) reasonable or strict procedures as required,
21 First Advantage furnished consumer reports to third parties that contained both false and
22 misleading information, which had an adverse effect on consumers' ability to obtain
employment.

23 **RESPONSE:** First Advantage denies the allegations in paragraph 7 of the
24 Amended Complaint.
25

26 8. Additionally, First Advantage also willfully violated the FCRA by failing to
27 provide notice to consumers that adverse public record information was being conveyed to
28 potential employers. First Advantage deprived applicants of an opportunity to correct the
false and misleading information.

1 **RESPONSE:** First Advantage denies the allegations in paragraph 8 of the
2 Amended Complaint.

3
4 9. As a result of Defendants' willful violations of the FCRA, Plaintiff Downing
5 and the members of the Classes were deprived of their privacy rights guaranteed to them
6 by federal law, and they are therefore entitled to statutory damages of at least \$100 and not
more than \$1,000 for each willful violation. *See* 15 U.S.C. § 1681n(a)(1)(A).

7 **RESPONSE:** First Advantage denies the allegations in paragraph 9 of the
8 Amended Complaint.

9
10 **PARTIES**

11 10. Plaintiff Downing is a natural person and citizen of the State of Arizona. He
12 resides in Show Low, Navajo County, Arizona.

13 **RESPONSE:** First Advantage is without knowledge or information sufficient
14 to form a belief as to the truth of the allegations in paragraph 10 of the Amended Complaint.
15 Accordingly, those allegations are denied.

16
17 11. Defendant Lowe's is a North Carolina limited liability company with its
18 principal place of business located at 1000 Lowe's Blvd, Mooresville, North Carolina
19 28117.

20 **RESPONSE:** First Advantage is without knowledge or information sufficient
21 to form a belief as to the truth of the allegations in paragraph 11 of the Amended Complaint.
22 Accordingly, those allegations are denied.

23
24 12. Defendant First Advantage is a Delaware corporation with its principal place
25 of business located at 1 Concourse Pkwy NE, Suite 200, Atlanta, GA 30328.

26 **RESPONSE:** First Advantage admits that is incorporated in Delaware and
27 admits that its principal place of business is located at 1 Concourse Pkwy NE, Suite 200,
28

1 Atlanta, GA 30328. First Advantage denies any and all remaining allegations in paragraph
2 12 of the Amended Complaint.

3
4 13. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 because this
5 action arises under the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., which is a
6 federal statute. Jurisdiction is additionally proper under the Class Action Fairness Act, 28
7 U.S.C. § 1332(d), et seq. (“CAFA”), because the classes each consist of over 100 people,
there is minimal diversity, and the amount in controversy, when aggregated, is over
\$5,000,000. Further, none of the exceptions to CAFA jurisdiction apply.

8
9 **RESPONSE:** First Advantage admits that Plaintiff has asserted claims under
10 the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., and that the Court has subject
11 matter jurisdiction under 28 U.S.C. § 1331. Plaintiff is without knowledge or information
12 sufficient to form a belief as to the truth of the allegations that “the classes each consist of
13 over 100 people, there is minimal diversity, and the amount in controversy, when
14 aggregated, is over \$5,000,000 [and that] none of the exceptions to CAFA jurisdiction
15 apply.” Accordingly, those allegations are denied. First Advantage denies any and all
16 remaining allegations in paragraph 13 of the Amended Complaint.
17
18

19
20 14. This Court has personal jurisdiction over Defendants because they conduct
21 substantial business in this District and the unlawful conduct alleged in the Complaint
22 occurred in this District or the unlawful decisions that lead to the violations of the FCRA
set forth in this Complaint were made in this District.

23
24 **RESPONSE:** First Advantage admits that it conducts business in this judicial
25 district. First Advantage denies it engaged in the conduct alleged throughout the Amended
26 Complaint. First Advantage denies any and all remaining allegations in paragraph 14 of
27 the Amended Complaint as alleged against it and denies any unlawful conduct. First
28

1 Advantage is without knowledge or information sufficient to form a belief as to the truth
2 of the allegations in paragraph 14 as alleged against the other defendant. Accordingly, those
3 allegations are denied.
4

5 15. Venue is proper in this District under 28 U.S.C. § 1391 because a substantial
6 part of the events and omissions giving rise to the claims occurred in or emanated from this
7 District, and because Plaintiff resides in this District and applied for work with Lowe's in
8 this District.

9 **RESPONSE:** Admitted.

10 16. Lowe's is a well-known American retail company specializing in home
11 improvement. It operates warehouse-style home improvement stores throughout the United
12 States, including Arizona.

13 **RESPONSE:** First Advantage is without knowledge or information sufficient
14 to form a belief as to the truth of the allegations in paragraph 16 of the Amended Complaint.
15 Accordingly, those allegations are denied.
16

17 17. First Advantage is a consumer reporting agency that collects and aggregates
18 information about consumers world-wide. First Advantage generates a substantial portion
19 of its business and income by providing background screening services to employers
20 nationwide.

21 **RESPONSE:** First Advantage denies the allegations in paragraph 17 of the
22 Amended Complaint.

23 18. In or around February 2022, Plaintiff applied for a job with Lowe's at a store
24 located in Show Low, Arizona.

25 **RESPONSE:** First Advantage is without knowledge or information sufficient
26 to form a belief as to the truth of the allegations in paragraph 18 of the Amended Complaint.
27 Accordingly, those allegations are denied.
28

1 19. In or around February 2022, in connection with his employment application,
2 Plaintiff was required to complete various acknowledgements of company disclosures,
3 including a disclosure regarding Plaintiff's background report.

4 **RESPONSE:** First Advantage is without knowledge or information sufficient
5 to form a belief as to the truth of the allegations in paragraph 19 of the Amended Complaint.
6 Accordingly, those allegations are denied.

7
8 20. Rather than provide a standalone disclosure—as the FCRA unambiguously
9 requires—Plaintiff was presented with a document styled, "Disclosure Regarding
10 Background Report." (See FCRA Disclosure, a true and accurate copy of which is attached
11 hereto as Ex. A.) The pre-report disclosure that Lowe's provided to applicants and
12 employees unlawfully combines disclosures to obtain consumer reports regarding
13 applicants and their children or wards. It states:

14 Lowe's Companies, Inc. and/or its affiliates, including Lowe's Home Centers,
15 LLC, ("Lowe's") may obtain a "background report" about you or your
16 child/ward for employment purposes from a third-party consumer reporting
17 agency. "Background report" means any written, oral, or other communication
18 of any information by a consumer reporting agency bearing on your or your
19 child's/ward's credit worthiness, credit standing, credit capacity, character,
20 general reputation, personal characteristics, or mode of living. The reports
21 may include information regarding your or your child's/ward's history,
22 criminal history, social security verification, motor vehicle records,
23 verification of your education or employment history, or other background
24 check results. Lowe's will not request any information related to your or your
25 child's/ward's worthiness, credit standing, or credit capacity without providing
26 you or your child/ward, separately, with information related to the use of that
27 information and obtaining separate authorization from you to obtain such
28 information, where required.

29 **RESPONSE:** First Advantage is without knowledge or information sufficient
30 to form a belief as to the truth of the allegations in paragraph 20 of the Amended Complaint.
31 Accordingly, those allegations are denied.

1 21. That is, Lowe's provides a single disclosure that seeks to satisfy the disclosure
2 requirements for it to obtain a consumer report regarding both the applicants and their
3 children, including their or their children's criminal history, motor vehicle records, credit
standing, credit capacity, educational history, employment history and more.

4 **RESPONSE:** First Advantage is without knowledge or information sufficient
5 to form a belief as to the truth of the allegations in paragraph 21 of the Amended Complaint.
6 Accordingly, those allegations are denied.
7

8 22. The disclosure also contains additional extraneous information: Despite
9 initially explaining that a consumer report may contain information relating to the
10 applicant's or their children's credit worthiness, credit standing, and credit capacity, in the
11 very next paragraph Lowe's purports to explain that it will not request any information
12 relates to applicant's or their children's "worthiness, credit standing, or credit capacity"
unless it provides a separate disclosure and authorization for credit information.

13 **RESPONSE:** First Advantage is without knowledge or information sufficient
14 to form a belief as to the truth of the allegations in paragraph 22 of the Amended Complaint.
15 Accordingly, those allegations are denied.
16

17 23. The disclosure does not standalone, nor is it clear and conspicuous. It is
18 opaque and confusing.

19 **RESPONSE:** First Advantage is without knowledge or information sufficient
20 to form a belief as to the truth of the allegations in paragraph 23 of the Amended Complaint.
21 Accordingly, those allegations are denied.
22

23 24. The inclusion of such extraneous information overshadows the consumer
24 report disclosure and renders the disclosure confusing to Plaintiff and the other class
25 members. By combining the disclosure to obtain an applicant's consumer report with a
26 disclosure to obtain information about their child or ward in a single document, and by
27 including a confusing and conflicting explanation regarding future disclosures, it is unclear
28 whether Lowe's intends to procure consumer reports regarding applicants, their
children/wards, or both. Nowhere does Lowe's make any attempt to explain why it would

1 need to access the consumer report of an applicant's children, wards, or other offspring.
2 This lack of clarity frustrates the purpose of the FCRA, which is to inform consumers and
3 allow them a meaningful opportunity to authorize such disclosures. Had a lawful disclosure
been provided, Plaintiff and others would not have signed it.

4 **RESPONSE:** First Advantage is without knowledge or information sufficient
5 to form a belief as to the truth of the allegations in paragraph 24 of the Amended Complaint.
6 Accordingly, those allegations are denied.
7

8 25. For its part, First Advantage furnished consumer reports to Lowe's and other
9 potential employers without first implementing reasonable procedures to ensure the
10 maximum possible accuracy of the information contained in the report, and failed to
11 implement strict procedures designed to ensure that when public information contained in
12 a consumer report is likely to have an adverse effect on a consumer's ability to obtain
employment, that such sensitive information is complete and up to date.

13 **RESPONSE:** First Advantage denies the allegations in paragraph 25 of the
14 Amended Complaint.
15

16 26. Lowe's contracted with First Advantage to compile and furnish a consumer
17 report regarding Downing and other class members for employment purposes.

18 **RESPONSE:** First Advantage denies the allegations in paragraph 26 of the
19 Amended Complaint. Responding further, First Advantage states that a separate entity,
20 First Advantage Background Services Corp., prepared a background report regarding
21 Plaintiff.
22

23 27. On or about February 26, 2022, First Advantage commenced a search for
24 Plaintiff's past criminal history, to be included in his consumer report.
25

26 **RESPONSE:** First Advantage denies the allegations in paragraph 27 of the
27 Amended Complaint.
28

1 28. After the search commenced, First Advantage noted that additional handling
2 was required with respect to Plaintiff's past criminal history.

3 **RESPONSE:** First Advantage denies the allegations in paragraph 28 of the
4 Amended Complaint.

5 29. On February 26, 2022, First Advantage again noted that research was required
6 with respect to Plaintiff's past criminal history.

7 **RESPONSE:** First Advantage denies the allegations in paragraph 29 of the
8 Amended Complaint.

9 30. On March 2, 2022, First Advantage again noted that research was required
10 with respect to Plaintiff's past criminal history.

11 **RESPONSE:** First Advantage denies the allegations in paragraph 30 of the
12 Amended Complaint.

13 31. On March 2, 2022, First Advantage furnished a consumer report regarding
14 Plaintiff to Lowe's for employment purposes.

15 **RESPONSE:** First Advantage denies the allegations in paragraph 31 of the
16 Amended Complaint.

17 32. The report included inaccurate and materially misleading information relating
18 to Plaintiff's prior criminal history, which had a negative impact on his employment
19 opportunities. In preparing the report, First Advantage failed to follow reasonable
20 procedures to ensure the maximum possible accuracy of the information contained in the
21 report. Instead, First Advantage furnished an inaccurate report containing three past
22 criminal convictions with the disposition stated as "guilty."

23 **RESPONSE:** First Advantage denies the allegations in paragraph 32 of the
24 Amended Complaint.

33. While Plaintiff did plead guilty to the three criminal charges between 2006 and 2009, it is not accurate to state that the disposition of those cases is “guilty.”

RESPONSE: First Advantage denies the allegations in paragraph 33 of the Amended Complaint.

34. On November 24, 2020, the Navajo County Superior Court issued an Order setting aside Plaintiff’s judgments of guilt (*see* Order Setting Aside Judgment of Guilt, a true and accurate copy of which is attached hereto as Ex. B), which restored Plaintiff’s civil rights under Arizona law pursuant to A.R.S. § 13-905. Order setting aside the judgments of guilt were made publicly available at <https://apps.supremecourt.az.gov/publicaccess/minutes.aspx>.

RESPONSE: First Advantage admits that a Minute Entry by the Superior Court of the State of Arizona in and for the County of Navajo, dated 11/24/2020 states, among other things, “IT IS ORDERED granting the Motion to Set Aside Judgment of Guilt to include the restoration of the Defendant’s civil rights and his right to own firearms.”. First Advantage denies any and all remaining allegations in paragraph 34 of the Amended Complaint.

35. Judgments setting aside guilt are not some arbitrary distinction. Rather, when a court sets aside a criminal conviction pursuant to A.R.S. § 13-905 and includes a certificate of second chance, the individual’s civil rights are restored, including occupational rights. The restoration of rights includes the release of the individual from all barriers and disabilities in obtaining occupational licenses issued under Arizona Title 32. *See* A.R.S. § 13-905(K). Further, Arizona law provides potential employers with protection should they choose to hire individuals that have had their convictions set aside. *Id.*; *see also* A.R.S. § 12-558.03, *et seq.*

RESPONSE: First Advantage admits that, as amended by AZ LEGIS 3 (2023), 2023 Ariz. Legis. Serv. Ch. 3 (S.B. 1036) (WEST), A.R.S. § 13-905(A) currently states “Except as provided in subsection P of this section, every person convicted of a criminal

1 offense, on fulfillment of the conditions of probation or sentence and discharge by the
2 court, may apply to the court to have the judgment of guilt set aside. The convicted person
3 shall be informed of this right at the time of sentencing. The court may issue an order that
4 includes a certificate of second chance to a person whose judgment of guilt is set aside
5 pursuant to subsection K or N of this section.” First Advantage admits that, as amended by
6 AZ LEGIS 3 (2023), 2023 Ariz. Legis. Serv. Ch. 3 (S.B. 1036) (WEST), A.R.S. § 13-
7 905(D) currently states “If the application is granted, the court shall set aside the judgment
8 of guilt, dismiss the complaint, information or indictment and order that the person be
9 released from all penalties and disabilities resulting from the conviction except those
10 imposed by: 1. The department of transportation pursuant to section 28–3304, 28–3305,
11 28–3306, 28–3307, 28–3308, 28–3312 or 28–3319. 2. The game and fish commission
12 pursuant to section 17–314 or 17–340.” First Advantage further admits that, as amended
13 by AZ LEGIS 3 (2023), 2023 Ariz. Legis. Serv. Ch. 3 (S.B. 1036) (WEST), A.R.S. § 13-
14 905(E) currently states “A conviction that is set aside may be: 1. Used as a conviction if
15 the conviction would be admissible had it not been set aside. 2. Alleged as an element of
16 an offense. 3. Used as a prior conviction. 4. Pleaded and proved in any subsequent
17 prosecution of the person by this state or any political subdivision of this state for any
18 offense. 5. Used by the department of transportation in enforcing section 28–3304, 28–
19 3305, 28–3306, 28–3307, 28–3308, 28–3312 or 28–3319 as if the judgment of guilt had
20 not been set aside.” Finally, First Advantage admits that, as amended by AZ LEGIS 3
21
22
23
24
25
26
27
28

1 (2023), 2023 Ariz. Legis. Serv. Ch. 3 (S.B. 1036) (WEST), A.R.S. § 13-905(K) currently
2 states “If the court grants the application to set aside the judgment of guilt, the court's order
3 must include a certificate of second chance if the person was convicted of any of the
4 following: 1. A misdemeanor. 2. A class 4, 5 or 6 felony and at least two years have elapsed
5 since the person fulfilled the conditions of probation or sentence. 3. A class 2 or 3 felony
6 and at least five years have elapsed since the person fulfilled the conditions of probation or
7 sentence.” First Advantage denies any and all remaining allegations in paragraph 35 of the
8 Amended Complaint.
9
10
11

12 36. By failing to inform potential employers that a prior conviction was set aside,
13 First Advantage provides false and inaccurate information that deprives employers of
14 critical data needed to make an informed decisions regarding potential applicants. It also
15 strips job applicants like Plaintiff from having the ability to attain gainful employment.

16 **RESPONSE:** First Advantage denies the allegations in paragraph 36 of the
17 Amended Complaint.

18 37. Additionally, despite preparing the report with public record information that
19 was likely to have an adverse effect on Plaintiff’s ability to obtain employment, First
20 Advantage also failed to provide any notice that the information was being furnished to
21 Lowe’s. This failure deprived Plaintiff of a meaningful opportunity to correct the
22 inaccurate information.

23 **RESPONSE:** First Advantage denies the allegations in paragraph 37 of the
24 Amended Complaint.

25 38. On or around March 10, 2022, Lowe’s informed Plaintiff that he was being
26 denied employment based in whole or in part on information contained within his consumer
27 report.
28

41. Excluded from the classes are (1) Defendants, Defendants' agents, subsidiaries, parents, successors, predecessors, and any entity in which Defendants or their parents have a controlling interest, and those entities' officers and directors, (2) the Judge or Magistrate Judge to whom this case is assigned and the Judge's or Magistrate Judge's immediate family, (3) persons who execute and file a timely request for exclusion, (4) persons who have had their claims in this matter finally adjudicated and/or otherwise released, (5) Plaintiff's and Defendants' counsel, and (6) the legal representatives, successors, and assigns of any such excluded person. Plaintiff anticipates the need to amend the Complaint, including the Class Definitions, following a reasonable period for class discovery.

RESPONSE: First Advantage admits that Plaintiff has defined the classes as listed. First Advantage denies any and all remaining allegations in paragraph 41 of the Amended Complaint and denies that the proposed "First Advantage Class" is a certifiable class.

42. **Numerosity:** The exact number of class members is unknown to Plaintiff at this time, but it is clear that individual joinder is impracticable for each of the Classes. On information and belief, there are thousands of individuals that fall into the defined Classes. Further, the class members can readily be ascertained through objective criteria, including Defendants' records.

RESPONSE: First Advantage denies the allegations in paragraph 42 of the Amended Complaint and denies that the proposed "First Advantage Class" is a certifiable class.

43. **Commonality:** Common questions of law and fact exist as to all members of the Classes for which this proceeding will provide common answers in a single stroke based upon common evidence, including:

- (a) Whether First Advantage violated the FCRA;
- (b) Whether First Advantage prepared consumer reports with inaccurate criminal dispositions;
- (c) Whether First Advantage implemented policies and procedures to ensure maximum possible accuracy of the consumer reports that it prepares;

(d) Whether First Advantage failed to follow its own policies and procedures to ensure the maximum possible accuracy of the consumer reports that it prepares;

(e) Whether First Advantage implemented strict procedures to ensure that where adverse public record information reported on a consumer report is likely to impact an applicant's ability to obtain employment that the information is complete and up to date;

(f) Whether First Advantage failed to follow its own procedures to ensure that adverse public record information that is reported on a consumer report is complete and up to date;

(g) Whether First Advantage's violations of the FCRA were willful;

(h) Whether Lowe's conduct described herein violated the FCRA;

(i) Whether Lowe's has procured or caused to be procured consumer reports about job applicants and employees;

(c) [sic] Whether Lowe's disclosure violates the FCRA's requirement that the pre-report disclosure be clear and conspicuous in a document consisting solely of the disclosure; and

(j) Whether Lowe's violations of the FCRA were willful.

RESPONSE: First Advantage denies the allegations in paragraph 43 of the Amended Complaint and denies that the proposed "First Advantage Class" is a certifiable class.

44. **Typicality:** As a result of Defendants' uniform and repeated pattern of providing and preparing consumer reports, Plaintiff and the Class Members suffered the same injury and similar damages. If Defendants' actions violated the FCRA as to Plaintiff, then it violated the FCRA as to all Class Members. Thus, Plaintiff's claims are typical of the claims of the other Class Members.

RESPONSE: First Advantage denies the allegations in paragraph 44 of the Amended Complaint and denies that the proposed "First Advantage Class" is a certifiable class.

45. **Adequate Representation:** Plaintiff is a member of the Classes and both he and his counsel will fairly and adequately represent and protect the interests of the Classes, as neither has interests adverse to those of the Class Members and Defendants have no

1 defenses unique to Plaintiff. In addition, Plaintiff has retained counsel competent and
2 experienced in complex litigation and class actions including class actions related to the
3 procurement of consumer reports for employment purposes under the Fair Credit Reporting
4 Act. Further, Plaintiff and his counsel are committed to vigorously prosecuting this action
on behalf of the members of the Classes, and they have the financial resources to do so.

5 **RESPONSE:** First Advantage denies the allegations in paragraph 45 of the
6 Amended Complaint and denies that the proposed “First Advantage Class” is a certifiable
7 class.
8

9 46. **Predominance:** The common questions of law and fact set forth above go to
10 the very heart of the controversy and predominate over any supposed individualized
11 questions. Irrespective of any given Class Member’s situation, the answer to whether
12 Defendants’ conduct described herein repeatedly violated the FCRA is the same for
everyone—a resounding “yes”—and the same will be proven using common evidence.

13 **RESPONSE:** First Advantage denies the allegations in paragraph 46 of the
14 Amended Complaint and denies that the proposed “First Advantage Class” is a certifiable
15 class.
16

17 47. **Superiority and Manageability:** A class action is superior to all other
18 methods of adjudicating the controversy. Joinder of all class members is impractical, and
19 the damages suffered by/available to any individual Class Members will likely be small
20 relative to the cost associated with prosecuting a lawsuit. Thus, the expense of litigating an
21 individual action will likely prohibit the Class Members from obtaining effective relief for
22 Defendants’ misconduct. In addition, there are numerous common factual and legal
23 questions that could result in inconsistent verdicts should there be several successive trials.
24 In contrast, a class action will present far fewer management difficulties, and it will
increase efficiency and decrease expense. Further, class-wide adjudication will also ensure
a uniform decision for the Class Members.

25 **RESPONSE:** First Advantage denies the allegations in paragraph 47 of the
26 Amended Complaint and denies that the proposed “First Advantage Class” is a certifiable
27 class.
28

48. Plaintiff reserves the right to revise the definition of the classes as necessary based upon information obtained in discovery.

RESPONSE: First Advantage admits that Plaintiff purports to reserve the right to revise the definition of the classes, and First Advantage reserves the right to object and respond to any attempted revision to the definition of the classes.

COUNT I

49. Plaintiff incorporates by reference the foregoing allegations as if fully set forth herein.

RESPONSE: First Advantage repeats and incorporates the foregoing responses as if fully stated herein.

50. The FCRA declares that:

Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes

15 U.S.C. § 1681b(b)(2)(A) (emphasis added).

RESPONSE: First Advantage admits that 15 U.S.C. § 1681b(b)(2)(A) states “Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a report to be procured, for employment purposes with respect to any consumer, unless – (i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment

1 purposes; and (ii) the consumer has authorized in writing (which authorization may be
 2 made on the document referred to in clause (i)) the procurement of the report by that
 3 person.” First Advantage denies any and all remaining allegations in paragraph 50 of the
 4 Amended Complaint.
 5

6 51. The FCRA defines a consumer report as:

7 . . . any written, oral, or other communication of any information by a
 8 consumer reporting agency bearing on a consumers’ credit worthiness,
 9 credit standing, cred-it capacity, character, general reputation, personal
 10 characteristics, or mode of living which is used or excepted to be used
 11 or collected in whole or in part for the purpose of serving as a factor
 12 establishing the consumer’s eligibility for . . .

(B) employment purposes . . .

15 U.S.C. § 1681a(d)(1).

13 **RESPONSE:** First Advantage admits that 15 U.S.C. § 1681a(d)(1) states “The
 14 term ‘consumer report’ means any written, oral, or other communication of any
 15 information by a consumer reporting agency bearing on a consumer’s credit worthiness,
 16 credit standing, credit capacity, character, general reputation, personal characteristics, or
 17 mode of living which is used or expected to be used or collected in whole or in part for the
 18 purpose of serving as a factor in establishing the consumer’s eligibility for—(A) credit or
 19 insurance to be used primarily for personal, family, or household purposes; (B)
 20 employment purposes; or (C) any other purpose authorized under section 1681b of this
 21 title.” First Advantage denies any and all remaining allegations in paragraph 51 of the
 22 Amended Complaint.
 23
 24
 25
 26

27 52. Lowe’s employment background checks are consumer reports.
 28

1 **RESPONSE:** First Advantage is without knowledge or information sufficient
2 to form a belief as to the truth of the allegations in paragraph 52 of the Amended Complaint.
3
4 Accordingly, those allegations are denied.

5 53. The pre-report disclosure that Lowe’s provided to applicants and employees
6 unlawfully combines a disclosure to obtain consumer reports about them with a disclosure
7 to obtain consumer reports about their children or wards. (Ex. A.) Lowe’s provides a single
8 disclosure that confusingly combines information about both the applicants themselves as
9 well as regarding their children or wards, including their or their children’s/ward’s criminal
10 history, motor vehicle records, credit standing, credit capacity, educational history,
11 employment history and more. (*Id.*)

12 **RESPONSE:** First Advantage is without knowledge or information sufficient
13 to form a belief as to the truth of the allegations in paragraph 53 of the Amended Complaint.
14 Accordingly, those allegations are denied.

15 54. The disclosure also contains additional extraneous information that appears
16 confusing and contradictory. (*Id.*) Despite explaining that a consumer report may contain
17 information relating to the applicant’s or their children’s/ward’s credit worthiness, credit
18 standing, and credit capacity, in the very next paragraph Lowe’s purports to explain that it
19 will not request any information relates to applicant’s or their children’s/ward’s
20 “worthiness, credit standing, or credit capacity” unless it provides a separate disclosure and
21 authorization for such credit information. (*Id.*)

22 **RESPONSE:** First Advantage is without knowledge or information sufficient
23 to form a belief as to the truth of the allegations in paragraph 54 of the Amended Complaint.
24 Accordingly, those allegations are denied.

25 55. By combining the applicant’s and their children’s/ward’s disclosure into one
26 document, and by including a confusing and conflicting explanation regarding disclosures,
27 Lowe’s disclosure cannot be said to “stand alone” in a document that consists solely of the
28 disclosure. A reasonable person would not have understood or authorized the reports had
an appropriate disclosures been provided. Plaintiff and the other class members wouldn't
have authorized the reports had appropriate disclosures been provided.

1 **RESPONSE:** First Advantage is without knowledge or information sufficient
 2
 3 to form a belief as to the truth of the allegations in paragraph 55 of the Amended Complaint.
 4 Accordingly, those allegations are denied.

5
 6 56. Defendant procured consumer reports with respect to Plaintiff and the Lowe's
 7 Class. The disclosures provided to Plaintiff were the same or substantially the same as the
 8 one provided to all Lowe's Class members. Thus, Defendant uniformly violated the FCRA
 9 rights of all Class members in the same way and, in the process, violated their right to
 information and their privacy rights as delineated by Congress.

10 **RESPONSE:** First Advantage admits that on February 26, 2022, Lowe's
 11 ordered a background report regarding Plaintiff from its subsidiary First Advantage
 12 Background Services Corp. First Advantage is without knowledge or information
 13 sufficient to form a belief as to the truth of the allegations in paragraph 56 of the Amended
 14 Complaint. Accordingly, those allegations are denied.

15
 16 57. Defendant's violations of 15 U.S.C. 1681b(b)(2)(A)(i) was willful for at least
 17 the following reasons:

18 (i) The rule that FRCA disclosures consist "solely" of that disclosure has
 19 been the law established for well over a decade.

20 (ii) Lowe's is a large company who regularly engages outside counsel—it
 21 had ample means and opportunity to seek legal advice regarding its FCRA
 22 responsibilities. As such, any violations were made in conscious disregard of
 the rights of others.

23 (iii) Lowe's previously settled a class action lawsuit for alleged violations
 24 of the FCRA's stand alone disclosure requirements. As such, its failure to
 25 comply with the FCRA cannot be seen as anything other than a willful
 defiance of the Act's requirements.

26 (iv) Lowe's inclusion of the disclosures relating to applicant's children or
 27 wards was intentional and serves no purpose to the vast majority of job
 applicants, including Plaintiff; and

28 (v) Clear judicial and administrative guidance—dating back to at least the
 1990s—regarding a company's FCRA responsibilities exists and is readily

1 available explaining that such disclosures must stand-alone. This readily-
 2 available guidance means Lowe's either was aware of its responsibilities or
 3 plainly should have been aware of its responsibilities but ignored them and
 4 violated the FCRA anyway.

5 (vi) The Ninth Circuit has clearly articulated the law in this area in a series
 6 of cases; beginning in 2017: *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017);
 7 *Gilberg v. Cal. Check Cashing Stores, LLC*, 913 F.3d 1169 (9th Cir. 2019);
 8 and *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082, 1095 (9th Cir. 2020). Thus,
 9 at this point in time there is no excuse for a company like Lowe's to be in
 10 noncompliance with the FCRA's clear and unambiguous requirements.

11 **RESPONSE:** First Advantage is without knowledge or information sufficient
 12 to form a belief as to the truth of the allegations in paragraph 57 of the Amended Complaint.
 13 Accordingly, those allegations are denied.

14 58. Plaintiff and the Lowe's Class seek damages under 15 U.S.C. § 1681n, *et seq.*
 15 Indeed, Plaintiff and the Lowe's Class are entitled to statutory damages of not less than
 16 \$100 and not more than \$1,000 for each of Defendant's willful violations pursuant to 15
 17 U.S.C. § 1681n(a)(1)(A).

18 **RESPONSE:** First Advantage is without knowledge or information sufficient
 19 to form a belief as to the truth of the allegations in paragraph 58 of the Amended Complaint.
 20 Accordingly, those allegations are denied.

21 59. In the alternative, Plaintiff and the Lowe's Class seek actual damages under
 22 15 U.S.C. § 1681o, *et seq.* Lowe's acted negligently by failing to provide a standalone
 23 disclosure. Had Lowe's provided a standalone disclosure, Plaintiff and the class members
 24 would not have authorized the procurement of their reports. As such, Lowe's breached its
 25 duty of care to Plaintiff and the Lowe's Class and this breach is the direct and proximate
 26 cause of Plaintiff's and the class members' damages. Plaintiff seeks actual damages in an
 27 amount to be proven at trial or, at a minimum, seeks nominal damages.
 28

1 **RESPONSE:** First Advantage is without knowledge or information sufficient
 2 to form a belief as to the truth of the allegations in paragraph 59 of the Amended Complaint.
 3 Accordingly, those allegations are denied.
 4

5 60. Accordingly, under the FCRA, Plaintiff and the Lowe's Class seek statutory
 6 damages, reasonable cost and attorneys' fees, pre- and post-judgment interest, and such
 7 other relief as the Court deems necessary, reasonable, and just.

8 **RESPONSE:** First Advantage is without knowledge or information sufficient
 9 to form a belief as to the truth of the allegations in paragraph 60 of the Amended Complaint.
 10 Accordingly, those allegations are denied.
 11

12 COUNT II

13 61. Plaintiff incorporates by reference the foregoing allegations as if fully set forth
 14 herein.

15 **RESPONSE:** First Advantage repeats and incorporates the foregoing responses
 16 as if fully stated herein.
 17

18 62. The FCRA declares that:

19 Except as provided in subparagraph (B), a person may not procure a
 20 consumer report, or cause a consumer report to be procured, for
 21 employment purposes with respect to any consumer, unless—

22 (i) a clear and conspicuous disclosure has been made in writing to the
 23 consumer at any time before the report is procured or caused to be
 24 procured, in a document that consists solely of the disclosure, that a
 25 consumer report may be obtained for employment purposes

26 15 U.S.C. § 1681b(b)(2)(A) (emphasis added).

27 **RESPONSE:** First Advantage admits that 15 U.S.C. § 1681b(b)(2)(A) states:
 28 “Except as provided in subparagraph (B), a person may not procure a consumer report, or
 cause a report to be procured, for employment purposes with respect to any consumer,

1 unless – (i) a clear and conspicuous disclosure has been made in writing to the consumer
 2 at any time before the report is procured or caused to be procured, in a document that
 3 consists solely of the disclosure, that a consumer report may be obtained for employment
 4 purposes; and (ii) the consumer has authorized in writing (which authorization may be
 5 made on the document referred to in clause (i)) the procurement of the report by that
 6 person.” First Advantage denies any and all remaining allegations in paragraph 62 of the
 7 Amended Complaint.
 8
 9

10 63. The FCRA defines a consumer report as:

11 “. . . any written oral or other communication of any information by a consumer
 12 reporting agency bearing on a consumers’ credit worthiness, credit standing, cred-it
 13 capacity, character, general reputation, personal characteristics, or mode of living
 14 which is used or excepted to be used or collected in whole or in part for the purpose
 15 of serving as a factor establishing the consumer’s eligibility for . . .

16 (B) employment purposes . . .

17 15 U.S.C. § 1681a(d)(1).

18 **RESPONSE:** First Advantage admits that 15 U.S.C. § 1681a(d)(1) states “The
 19 term ‘consumer report’ means any written, oral, or other communication of any
 20 information by a consumer reporting agency bearing on a consumer’s credit worthiness,
 21 credit standing, credit capacity, character, general reputation, personal characteristics, or
 22 mode of living which is used or expected to be used or collected in whole or in part for the
 23 purpose of serving as a factor in establishing the consumer’s eligibility for—(A) credit or
 24 insurance to be used primarily for personal, family, or household purposes; (B)
 25 employment purposes; or (C) any other purpose authorized under section 1681b of this
 26
 27
 28

1 title.” First Advantage denies any and all remaining allegations in paragraph 63 of the
2 Amended Complaint.

3
4 64. Lowe’s background checks are consumer reports.

5 **RESPONSE:** First Advantage is without knowledge or information sufficient
6 to form a belief as to the truth of the allegations in paragraph 64 of the Amended Complaint.
7
8 Accordingly, those allegations are denied.

9 65. In addition to failing to stand-alone, Lowe’s disclosure also willfully violated
10 the FCRA by not being clear and conspicuous. The disclosure repeatedly and confusingly
11 informs Plaintiff and the Class Members that Lowe’s may obtain consumer reports
12 regarding both them and their children or wards. The scope of the consumer reports can
13 also include information concerning the applicant’s or their children’s or ward’s credit
14 worthiness, credit standing, credit capacity, character, general reputation, personal
15 characteristics, mode of living, history, criminal history, social security verification, motor
16 vehicle records, verification of your education or employment history, or other background
17 check results. The inclusion of multiple disclosures regarding applicants and their children
18 or wards renders the disclosure confusing and cannot be said to be “clear and conspicuous”.

19 **RESPONSE:** First Advantage is without knowledge or information sufficient
20 to form a belief as to the truth of the allegations in paragraph 65 of the Amended Complaint.
21
22 Accordingly, those allegations are denied.

23 66. The disclosure also confusingly includes conflicting information regarding
24 the procurement of credit information. Again, Lowe's discloses that a consumer report may
25 contain information relating to the applicant’s or their children’s credit worthiness, credit
26 standing, and credit capacity. Then, in the very next paragraph, Lowe’s purports to explain
27 that it will not request any information related to applicant’s or their children’s “worthiness,
28 credit standing, or credit capacity” unless it provides a separate disclosure and
authorization for credit information. The unnecessary inclusion of this conflicting
information detracts from the purpose of the disclosure and renders the disclosure
confusing.

1 **RESPONSE:** First Advantage is without knowledge or information sufficient
2 to form a belief as to the truth of the allegations in paragraph 66 of the Amended Complaint.
3 Accordingly, those allegations are denied.
4

5 67. In short, the pre-report disclosure that Lowe's provided to Plaintiff and the
6 Lowe's Class members willfully violated the FCRA by not being clear and conspicuous.
7 Indeed, a reasonable person would have been confused by the disclosure.

8 **RESPONSE:** First Advantage is without knowledge or information sufficient
9 to form a belief as to the truth of the allegations in paragraph 67 of the Amended Complaint.
10 Accordingly, those allegations are denied.
11

12 68. Plaintiff and the other class members wouldn't have authorized the reports
13 had appropriate disclosures been provided.

14 **RESPONSE:** First Advantage is without knowledge or information sufficient
15 to form a belief as to the truth of the allegations in paragraph 68 of the Amended Complaint.
16 Accordingly, those allegations are denied.
17

18 69. Defendant procured consumer reports with respect to Plaintiff and the Lowe's
19 Class. The disclosures provided to Plaintiff were the same or substantially the same as the
20 one provided to all Lowe's Class members. Thus, Defendant uniformly violated the FCRA
21 rights of all Class members in the same way and, in the process, violated their right to
22 information and their privacy rights as delineated by Congress.

23 **RESPONSE:** First Advantage admits that on February 26, 2022, Lowe's
24 ordered a background report regarding Plaintiff from its subsidiary First Advantage
25 Background Services Corp. First Advantage is without knowledge or information
26 sufficient to form a belief as to the remaining allegations in paragraph 69 of the Amended
27 Complaint.
28

70. Defendant's violation of 15 U.S.C. § 1681b(b)(2)(A)(i) was willful for at least the following reasons:

- (i) The rule that FCRA disclosures be "clear and conspicuous" has been the law established for well over a decade;
- (ii) Lowe's is a large company who regularly engages outside counsel—it had ample means and opportunity to seek legal advice regarding its FCRA responsibilities. As such any violations were made in conscious disregard of the rights of others;
- (iii) Lowe's previously settled a class action lawsuit for alleged violations of the FCRA's clear and conspicuous disclosure requirements. As such, its failure to comply with the FCRA cannot be seen as anything other than a willful defiance of the Act's requirements;
- (iv) Lowe's inclusion of the disclosures relating to applicant's children or wards was intentional and serves no purpose to the vast majority of job applicants, including Plaintiff; and
- (v) Clear judicial and administrative guidance—dating back to at least the 1990s—regarding a company's FCRA responsibilities exists and is readily available explaining that such disclosures must be clear and conspicuous. This readily-available guidance means Lowe's either was aware of its responsibilities or plainly should have been aware of its responsibilities but ignored them and violated the FCRA anyway.
- (vi) The Ninth Circuit has clearly articulated the law in this area in a series of cases, beginning in 2017: *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017); *Gilberg v. Cal. Check Cashing Stores, LLC*, 913 F.3d 1169 (9th Cir. 2019); and *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082, 1095 (9th Cir. 2020). Thus, at this point in time there is no excuse for a company like Lowe's to be in noncompliance with the FCRA's clear and unambiguous requirements.

RESPONSE: First Advantage is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 70 of the Amended Complaint. Accordingly, those allegations are denied.

71. Plaintiff and the Lowe's Class seek damages under 15 U.S.C. § 1681n, *et seq.* Indeed, Plaintiff and the Lowe's Class are entitled to statutory damages of not less than \$100 and not more than \$1,000 for each of Defendant's willful violations pursuant to 15 U.S.C. § 1681n(a)(1)(A).

1 75. First Advantage is a “person” and a “consumer reporting agency” as defined
2 by 15 U.S.C. § 1681a(b) and (f).

3 **RESPONSE:** First Advantage denies the allegations in paragraph 75 of the
4 Amended Complaint.

5 76. Plaintiff and members of the First Advantage Class are “consumers” as that
6 term is defined by 15 U.S.C. § 1681a(c).

7 **RESPONSE:** First Advantage is without knowledge or information sufficient
8 to form a belief as to the truth of the allegations in paragraph 76 of the Amended Complaint.
9 Accordingly, those allegations are denied. First Advantage further denies that the proposed
10 “First Advantage Class” is a certifiable class.
11

12 77. The FCRA declares that “[w]henver a consumer reporting agency prepares a
13 consumer report it shall follow reasonable procedures to assure maximum possible
14 accuracy of the information concerning the individual about whom the report relates.” 15
15 U.S.C. § 1681e(b).
16

17 **RESPONSE:** Admitted.

18 78. First Advantage prepared inaccurate and materially misleading consumer
19 reports relating to Plaintiff’s prior criminal history, which had a negative impact on his
20 employment opportunities.

21 **RESPONSE:** First Advantage denies the allegations in paragraph 78 of the
22 Amended Complaint.
23

24 79. In preparing the report, First Advantage failed to follow reasonable
25 procedures to assure the maximum possible accuracy of the information contained in the
26 report. Indeed, First Advantage furnished a report containing three prior criminal
27 convictions with the disposition stated as “guilty.” This was inaccurate.
28

1 **RESPONSE:** First Advantage denies the allegations in paragraph 79 of the
2 Amended Complaint.

3
4 80. While Plaintiff pleaded guilty to the three charges between 2006 and 2009, he
5 has since taken steps to rehabilitate his standing in his community such that the disposition
6 is no longer “guilty”.

7 **RESPONSE:** First Advantage admits that a Minute Entry by the Superior Court
8 of the State of Arizona in and for the County of Navajo, dated 11/24/2020 states, among
9 other things, “IT IS ORDERED granting the Motion to Set Aside Judgment of Guilt to
10 include the restoration of the Defendant’s civil rights and his right to own firearms.” First
11 Advantage is without knowledge or information sufficient to form a belief as to the truth
12 of the remaining allegations in paragraph 80 of the Amended Complaint. Accordingly,
13 those allegations are denied.
14
15

16 81. On November 24, 2020, the Navajo County Superior Court issued an Order
17 setting aside Plaintiff’s judgments of guilt (*see* Ex. B), which restored Plaintiff’s civil rights
18 under Arizona law pursuant to A.R.S. § 13-905. The Order setting aside the judgments of
19 guilt were made publicly available at
<https://apps.supremecourt.az.gov/publicaccess/minutes.aspx>.

20 **RESPONSE:** First Advantage admits that a Minute Entry by the Superior Court
21 of the State of Arizona in and for the County of Navajo, dated 11/24/2020 states, among
22 other things, “IT IS ORDERED granting the Motion to Set Aside Judgment of Guilt to
23 include the restoration of the Defendant’s civil rights and his right to own firearms.” First
24 Advantage denies any and all remaining allegations in paragraph 81 of the Amended
25 Complaint.
26
27
28

82. The judgments setting aside guilt are not the same as a criminal conviction. Rather, when a court sets aside a criminal conviction pursuant to A.R.S. § 13-905 and includes a certificate of second chance, the individual's civil rights are restored, including occupational rights. The restoration of rights includes the release of the individual from barriers and disabilities in obtaining occupational licenses issued under Arizona Title 32. *See* A.R.S. § 13-905(K). Further, Arizona law provides potential employers with protection should they choose to hire individuals that have had their convictions set aside. *Id.*; *see also* A.R.S. § 12-558.03, *et seq.*

RESPONSE: First Advantage admits that A.R.S. 13-905(K), as amended by AZ LEGIS 3 (2023), 2023 Ariz. Legis. Serv. Ch. 3 (S.B. 1036) (WEST), currently states: "If the court grants the application to set aside the judgment of guilt, the court's order must include a certificate of second chance if the person was convicted of any of the following: 1. A misdemeanor. 2. A class 4, 5 or 6 felony and at least two years have elapsed since the person fulfilled the conditions of probation or sentence. 3. A class 2 or 3 felony and at least five years have elapsed since the person fulfilled the conditions of probation or sentence." First Advantage admits that A.R.S § 12-558.03 currently states: "An employer is not liable for hiring an employee or contracting with an independent contractor who has previously been convicted of a criminal offense." First Advantage denies any and all remaining allegations in paragraph 82 of the Amended Complaint.

83. By failing to inform potential employers that a prior conviction was set aside, First Advantage robs employers of critical information to make an informed decision regarding potential applicants and the potential risks associated with hiring applicants.

RESPONSE: First Advantage denies the allegations in paragraph 83 of the Amended Complaint.

1 84. By failing to adopt adequate procedures, First Advantage caused Plaintiff and
2 the class members actual harm by preparing and providing inaccurate and materially
3 misleading consume [*sic*] reports to third parties.

4 **RESPONSE:** First Advantage denies the allegations in paragraph 84 of the
5 Amended Complaint.

6 85. On information and belief, First Advantage has prepared more than one report
7 regarding Plaintiff that contained the same inaccurate information.

8 **RESPONSE:** First Advantage denies the allegations in paragraph 85 of the
9 Amended Complaint.
10

11 86. On information and belief, First Advantage's inclusion of the "guilty"
12 disposition on Plaintiff's consumer report violated its own written policies and procedures
13 to ensure the maximum possible accuracy of the information contained in consumer
14 reports.

15 **RESPONSE:** First Advantage denies the allegations in paragraph 86 of the
16 Amended Complaint.

17 87. Pursuant to 15 U.S.C. § 1681o, *et seq.* and 15 U.S.C. § 1681n, *et seq.*, First
18 Advantage is liable to Plaintiff and the First Advantage Class for failing to implement and
19 follow reasonable procedures to assure the maximum possible accuracy of Plaintiff's and
20 the class members' consumer reports in violation of 15 U.S.C. § 1681e(b).

21 **RESPONSE:** First Advantage denies the allegations in paragraph 87 of the
22 Amended Complaint. First Advantage further denies that the proposed "First Advantage
23 Class" is a certifiable class.
24

25 88. Defendant's violation of 15 U.S.C. § 1681e(b) was willful for at least the
26 following reasons:

27 (i) The rule that consumer reporting agencies must implement and follow
28 reasonable procedures to assure the maximum possible accuracy of the information
contained in consumer reports has been the law established for decades;

1 (ii) On information and belief, First Advantage adopted and then failed to follow
2 its own written policies and procedures to ensure the maximum possible accuracy of
the information contained in consumer reports;

3 (iii) First Advantage commenced the search for Plaintiff's criminal history on
4 February 26, 2022 and completed the report on March 2, 2022. Hence, ample time
5 existed for First Advantage to ensure that the criminal convictions were reported
accurately;

6 (iv) The report prepared by First Advantage regarding Plaintiff noted that
7 "Research [was] In Progress" for four days and further noted that "Additional
8 handling [was] required" with respect to Plaintiff's criminal history. Despite this
additional research and handling, First Advantage failed to report Plaintiff's or the
class members' criminal convictions accurately;

9 (v) The Order setting aside Plaintiff's judgment of guilt and restoring his civil
10 rights has been publicly available for over a year at the time the report was furnished;

11 (vi) First Advantage is a large corporation who regularly engages inside and
12 outside counsel—it had ample means and opportunity to seek legal advice regarding
its FCRA responsibilities. As such, any violations were made in conscious disregard
13 of the rights of others;

14 (vii) First Advantage describes itself as a leader in the background reporting
industry with respect to employment related consumer report;

15 (viii) First Advantage regularly finishes consumer reports to businesses, such as
16 Lowe's, or the purpose of making employment related decisions. Accordingly, First
17 Advantage's failure to implement reasonable procedures had a widespread effect;
and

18 (ix) First Advantage profited off the sale of Plaintiff's and the class members'
19 consumer reports containing incomplete and outdated information on a repeated
basis.

20 **RESPONSE:** First Advantage denies the allegations in paragraph 88 of the

21
22 Amended Complaint.

23 89. Plaintiff and the First Advantage Class seek damages under 15 U.S.C. §
24 1681n, *et seq.* Indeed, Plaintiff and the First Advantage Class are entitled to statutory
25 damages of not less than \$100 and not more than \$1,000 for each of Defendant's willful
violations pursuant to 15 U.S.C. § 1681n(a)(1)(A).
26
27
28

90. In the alternative, Plaintiff and the First Advantage Class seek actual damages under 15 U.S.C. § 1681o, *et seq.* First Advantage acted negligently by failing to adopt reasonable procedures to ensure the maximum possible accuracy of information contained in consumer reports. As such, First Advantage breached its duty of care to Plaintiff and the First Advantage Class and this breach is the direct and proximate cause of Plaintiff's and the class members' damages. Plaintiff seeks actual damages in an amount to be proven at trial or, at a minimum, seeks nominal damages.

RESPONSE: First Advantage denies the allegations in paragraph 90 of the Amended Complaint. First Advantage further denies that the proposed “First Advantage Class” is a certifiable class.

91. Accordingly, under the FCRA, Plaintiff and the First Advantage Class seek statutory damages, reasonable cost and attorneys' fees, pre- and post-judgment interest and such other relief as the Court deems necessary, reasonable, and just.

RESPONSE: First Advantage denies the allegations in paragraph 91 of the Amended Complaint. First Advantage further denies that the proposed “First Advantage Class” is a certifiable class.

COUNT IV

92. Plaintiff incorporates by reference the foregoing allegations as if fully set forth herein.

RESPONSE: First Advantage repeats and incorporates the foregoing responses as if fully stated herein.

1 93. First Advantage is a “person” and a “consumer reporting agency” as defined
2 by 15 U.S.C. § 1681a(b) and (f).

3 **RESPONSE:** First Advantage denies the allegations in paragraph 93 of the
4 Amended Complaint.

5 94. Plaintiff and members of the First Advantage Class are “consumers” as that
6 term is defined by 15 U.S.C. § 1681a(c).

7 **RESPONSE:** First Advantage is without knowledge or information sufficient
8 to form a belief as to the truth of the allegations in paragraph 94 of the Amended Complaint.
9 First Advantage further denies that the proposed “First Advantage Class” is a certifiable
10 class.
11

12 95. The FCRA declares that:

13 A consumer reporting agency which furnishes a consumer report for employment
14 purposes and which for that purpose compiles and reports items of information on
15 consumers which are matters of public record and are likely to have an adverse effect
16 upon a consumer's ability to obtain employment shall--

17 (1) at the time such public record information is reported to the user of such
18 consumer report, notify the consumer of the fact that public record
19 information is being reported by the consumer reporting agency, together with
20 the name and address of the person to whom such information is being
21 reported; or

22 (2) maintain strict procedures designed to insure that whenever public record
23 information which is likely to have an adverse effect on a consumer's ability
24 to obtain employment is reported it is complete and up to date. For purposes
25 of this paragraph, items of public record relating to arrests, indictments,
26 convictions, suits, tax liens, and outstanding judgments shall be considered up
27 to date if the current public record status of the item at the time of the report
28 is reported.

15 U.S.C. 1681k(a) (emphasis added).

RESPONSE: Admitted.

1 96. First Advantage furnished consumer reports regarding Plaintiff and the First
2 Advantage Class for employment purposes that possessed information on consumers that
3 were likely to have an adverse effect upon a consumer's ability to obtain employment.

4 **RESPONSE:** First Advantage denies the allegations in paragraph 96 of the
5 Amended Complaint.

6 97. First Advantage violated Section 1681k(a)(2) by failing to adopt strict
7 procures [*sic*] designed to insure that public record information that is likely to have an
8 adverse effect on a consumer's ability to obtain employment is complete and up to date.

9 **RESPONSE:** First Advantage denies the allegations in paragraph 97 of the
10 Amended Complaint.

11 98. First Advantage also failed to provide Plaintiff and the First Advantage Class
12 with notice that First Advantage was reporting public record information to potential
13 employers that was likely to have an adverse effect on the ability of Plaintiff and the First
14 Advantage Class to obtain employment. Further, First Advantage failed to provide Plaintiff
15 or the other members of the First Advantage Class with the name and address of the person
16 to whom such information was being reported.

17 **RESPONSE:** First Advantage denies the allegations in paragraph 98 of the
18 Amended Complaint.

19 99. Criminal convictions or information showing "guilty" with respect to crimes
20 is likely to have an adverse effect on a consumer's ability to obtain employment.

21 **RESPONSE:** First Advantage denies the allegations in paragraph 99 of the
22 Amended Complaint.

23 100. Here, First Advantage reported the disposition of past criminal convictions for
24 Plaintiff and the Class as "guilty". This was inaccurate. Records of past criminal
25 convictions are public records under the FCRA. At the time the report was furnished, the
26 convictions were set aside and Plaintiff's and the class members' civil rights were restored
27 pursuant to A.R.S. § 13-905.

1 **RESPONSE:** First Advantage admits that a Minute Entry by the Superior Court
2 of the State of Arizona in and for the County of Navajo, dated 11/24/2020 states, among
3 other things, “IT IS ORDERED granting the Motion to Set Aside Judgment of Guilt to
4 include the restoration of the Defendant’s civil rights and his right to own firearms.” First
5 Advantage denies any and all remaining allegations in paragraph 100 of the Amended
6 Complaint.
7
8

9 101. By publishing past criminal convictions without their current disposition, First
10 Advantage reported adverse public information that was not complete or up to date.

11 **RESPONSE:** First Advantage denies the allegations in paragraph 101 of the
12 Amended Complaint.
13

14 102. First Advantage failed to adopt strict procedures to ensure that criminal
15 convictions are reported with the current disposition. This constitutes a willful violation of
16 Section 1681k(a)(2).

17 **RESPONSE:** First Advantage denies the allegations in paragraph 102 of the
18 Amended Complaint.
19

20 103. On information and belief, First Advantage’s failure to report that the criminal
21 convictions were set aside and that civil rights were restored violated its own written
22 policies and procedures to ensure that information contained in consumer reports is
complete and up to date.

23 **RESPONSE:** First Advantage denies the allegations in paragraph 103 of the
24 Amended Complaint.
25

26 104. By failing to adopt strict procedures or provide any notice, First Advantage
27 harmed applicant and employees by conveying inaccurate information regarding their
28 criminal history to third parties and deprived applicants and employees of the ability to

1 address any inaccurate or incomplete information contained within the consumer report
2 prior to the employer's decision regarding the information.

3 **RESPONSE:** First Advantage denies the allegations in paragraph 104 of the
4 Amended Complaint.

5
6 105. Pursuant to 15 U.S.C. § 1681o, *et seq.* and 15 U.S.C. § 1681n, *et seq.*, First
7 Advantage is liable to Plaintiff and the First Advantage Class for failing to provide notice
8 that potentially adverse public record information was being reported or by failing to
9 implement and follow strict procedures to ensure that information contained in Plaintiff's
10 and the class members' consumer reports that was likely to adversely impact their ability
to obtain or keep employment was complete and up to date in violation of 15 U.S.C. §
1681k(a)(2).

11 **RESPONSE:** First Advantage denies the allegations in paragraph 105 of the
12 Amended Complaint. First Advantage further denies that the proposed "First Advantage
13 Class" is a certifiable class.
14

15 106. First Advantage's violation of 15 U.S.C. § 1681k(a)(2) was willful for at least
16 the following reasons:

- 17 (i) The rule that consumer reporting agencies must implement and
18 follow strict procedures to insure that potentially adverse public record
19 information contained in consumer reports must be complete and up to
date has been the law established for decades;
- 20 (ii) The rule that consumer reporting agencies provide notice that
21 potentially adverse public record information is being reported by a
consumer reporting agency has been the law established for decades;
- 22 (iii) On information and belief, First Advantage adopted and then failed
23 to follow its own written policies and procedures to ensure that
information contained in consumer reports is complete and up to date;
- 24 (iv) First Advantage commenced the search for Plaintiff's criminal
25 history on February 26, 2022 and completed the report on March 2,
2022. Hence, ample time existed for First Advantage to ensure that the
26 criminal convictions were up to date and complete;
- 27 (v) The report prepared by First Advantage regarding Plaintiff noted
28 that "Research [was] In Progress" for four days and further noted that

“Additional handling [was] required” with respect to Plaintiff’s criminal history;

(vi) The Order setting aside Plaintiff’s judgment of guilt and restoring his civil rights has been publicly available for over a year at the time the report was furnished;

(vii) First Advantage is a large corporation who regularly engages inside and outside counsel—it had ample means and opportunity to seek legal advice regarding its FCRA responsibilities. As such, any violations were made in conscious disregard of the rights of others;

(viii) First Advantage describes itself as a leader in the background reporting industry with respect to employment related consumer reports;

(ix) First Advantage regularly furnishes consumer reports to businesses, such as Lowe’s, for the purpose of making employment related decisions Accordingly, First Advantage’s failure to implement reasonable procedures had a wide spread effect; and

(x) First Advantage profited off the sale of Plaintiff’s and the class members’ consumer reports containing incomplete and outdated information on a repeated basis.

RESPONSE: First Advantage denies the allegations in paragraph 106 of the Amended Complaint.

107. Plaintiff and the First Advantage Class seek damages under 15 U.S.C. § 1681n, *et seq.* Plaintiff and the First Advantage Class are entitled to statutory damages of not less than \$100 and not more than \$1,000 for each of Defendant’s willful violations pursuant to 15 U.S.C. § 1681n(a)(1)(A).

RESPONSE: First Advantage denies the allegations in paragraph 107 of the Amended Complaint. First Advantage further denies that the proposed “First Advantage Class” is a certifiable class.

108. In the alternative, Plaintiff and the First Advantage Class seek actual damages under 15 U.S.C. § 1681o, *et seq.* First Advantage acted negligently by failing to adopt strict procedures to insure that adverse public record information is complete and up to date. As such, First Advantage breached its duty of care to Plaintiff and the First Advantage Class and this breach is the direct and proximate cause of Plaintiff’s and the class members’

1 damages. Plaintiff seeks actual damages in an amount to be proven at trial or, at a
2 minimum, seeks nominal damages.

3 **RESPONSE:** First Advantage denies the allegations in paragraph 108 of the
4 Amended Complaint. First Advantage further denies that the proposed “First Advantage
5 Class” is a certifiable class.
6

7 109. Accordingly, under the FCRA, Plaintiff and the First Advantage Class seek
8 statutory damages, reasonable cost and attorneys’ fees, pre- and post-judgment interest,
9 and such other relief as the Court deems necessary, reasonable, and just.

10 **RESPONSE:** First Advantage denies the allegations in paragraph 109 of the
11 Amended Complaint. First Advantage further denies that the proposed “First Advantage
12 Class” is a certifiable class.
13

14 GENERAL DENIAL

15 First Advantage denies the allegations in the “Prayer for Relief” section of the
16 Amended Complaint and further denies all relief sought by Plaintiff through the Amended
17 Complaint. First Advantage denies each and every factual allegation contained in the
18 Complaint that is not expressly admitted in the preceding paragraphs of this Answer. In
19 further responses, all allegations, headings, and unnumbered paragraphs not expressly
20 admitted herein are denied.
21
22
23

24 **AFFIRMATIVE DEFENSES**

25 Without waiving any non-affirmative defenses that are not stated herein and without
26 assuming the burden of proof on any defense where the law provides otherwise, First
27
28

1 Advantage submits its affirmative and other defenses to the claims set forth in the Amended
2 Complaint as follows:

3
4 **FIRST AFFIRMATIVE DEFENSE**

5 To the extent Plaintiff has failed to mitigate his alleged damages, any recovery
6 should be reduced accordingly.

7
8 **SECOND AFFIRMATIVE DEFENSE**

9 The damages Plaintiff seeks must be set off against any settlement or other
10 recoveries by Plaintiff.

11
12 **THIRD AFFIRMATIVE DEFENSE**

13 Because First Advantage acted, at all times relevant to the Amended Complaint, in
14 a good faith effort to comply with the FCRA, and because any alleged violation would not
15 have been willful, Plaintiff is not entitled to punitive damages.

16
17
18 **FOURTH AFFIRMATIVE DEFENSE**

19 Plaintiff's claims are subject to dismissal, in whole or in part, to the extent the claims
20 made in the Amended Complaint on behalf of Plaintiff and/or members of the proposed
21 classes are barred by release. To the extent Plaintiff and/or any members of the proposed
22 First Advantage Class were members of previous actions against First Advantage in which
23 a release was provided to First Advantage that would cover some or all of their claims in
24 this lawsuit, then those claims have been released. The extent to which this defense is
25
26
27
28

1 applicable, and whether additional grounds exist in support of this defense, will be
2 developed through discovery.

3
4 **FIFTH AFFIRMATIVE DEFENSE**

5 Plaintiff's claims are subject to dismissal, in whole or in part, to the extent the claims
6 made in the Amended Complaint on behalf of Plaintiff and/or members of the proposed
7 classes are barred by judicial estoppel. To the extent Plaintiff and/or any members of the
8 proposed First Advantage Class have taken a position in prior legal matters that is contrary
9 to a position they are taking in this lawsuit, they would be judicially estopped from taking
10 that position in this lawsuit. The extent to which this defense is applicable, and whether
11 additional grounds exist in support of this defense, will be developed through discovery.
12
13

14
15 **SIXTH AFFIRMATIVE DEFENSE**

16 Plaintiff's claims are subject to dismissal, in whole or in part, to the extent the claims
17 made in the Amended Complaint on behalf of Plaintiff and/or members of the proposed
18 classes are barred by res judicata and/or collateral estoppel. To the extent Plaintiff and/or
19 any members of the proposed First Advantage Class were members of previous actions
20 against First Advantage that were subject to dispositive rulings regarding matters that are
21 at issue in this lawsuit, those rulings have a res judicata, collateral estoppel and/or issue
22 preclusion effect on those matters here. The extent to which this defense is applicable, and
23 whether additional grounds exist in support of this defense, will be developed through
24 discovery.
25
26
27
28

SEVENTH AFFIRMATIVE DEFENSE

The proposed class is not certifiable because it does not comply with the requirement of Rule 23 of the Federal Rules of Civil procedure.

WHEREFORE, having fully responded to the Amended Complaint, First Advantage respectfully requests that the Court enter an Order denying all of the claims against First Advantage in the Amended Complaint, that judgment be rendered in favor of First Advantage and against Plaintiff with respect to all claims against First Advantage, and that First Advantage be granted such other and further relief as the Court deems just, equitable, and proper.

RESPECTFULLY SUBMITTED this 22nd day of June, 2023.

/s/ Mandi J. Karvis

Mandi J. Karvis/Bar No. 021858

Bar No. 021858

WICKER SMITH O'HARA MCCOY & FORD, P.A.

One N. Central Ave., Suite 860

Phoenix, AZ 85004

mkarvis@wickersmith.com

(602) 648-2240

Henry R. Chalmers

Admitted Pro Hac Vice

ARNALL GOLDEN GREGORY LLP

171 17th Street NW, Suite 2100

Atlanta, GA 30363

henry.chalmers@agg.com

natalie.cascario@agg.com

(404) 873-8646

Counsel for Defendant First Advantage Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the above titled document was served upon counsel of record by filing such papers via the Court's ECF system on June 22, 2023.

/s/Mandi J. Karvis

Mandi J. Karvis